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Fraud by the Supreme Court: Racial Discrimination by a State Institution of Higher Education Upheld on “Diversity” Grounds

Lino A. Graglia*

I. INTRODUCTION

Dishonesty has been characteristic of the Supreme Court’s decisions on race at least since 1968 when it held in *Green v. County School Board*¹ that official race discrimination is sometimes not only constitutionally permissible but, for the first time in our history, constitutionally required. In that case, the Court performed the extraordinary feat of changing a prohibition of race discrimination into a requirement of race discrimination while insisting that no change had been made.² *Grutter v. Bollinger*,³ upholding race discrimination by a state law school on the ground that it was “narrowly tailored” to serve a “compelling state interest” in educationally valuable “diversity,” carries this characteristic dishonesty to, if possible, new extremes. The purpose of race-preferencing in student admission programs in higher education is to admit blacks to selective schools to which they could not otherwise be admitted, in order to save the schools from the political and ideological embarrassment of having no, or very few, blacks.

The University of Michigan Law School, along with virtually all other selective colleges and universities, has practiced racial discrimination in granting and denying admission since or shortly after 1968,⁴ when it was apparently permitted by the *Green* decision.⁵ In

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1. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

2. For a full discussion of the Court’s reasoning in *Green*, see generally LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976).

3. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

4. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (invalidating race preferences at the University of Texas School of Law); *DeFunis v. Odegaard*, 507 P.2d 1169 (Wash. 1973), *vacated by* 416 U.S. 312 (1974) (upholding race preferences at the University of Washington School of Law); Lino A. Graglia, *Special Admissions of the “Culturally Deprived” to Law School*, 119 U. PA. L. REV. 351 (1970) (arguing against racial preferences in college and university admissions).

Grutter, the Court held, in an opinion by Justice Sandra Day O'Connor (with Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas dissenting), that such discrimination is permissible if each applicant is given "individualized consideration" in "competition with all other applicants."⁶ A challenge by rejected white applicants, who concededly would have been admitted if they were of a preferred race, was therefore rejected. In a companion case, *Gratz v. Bollinger*,⁷ the Court, in an opinion by Chief Justice Rehnquist (with Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg dissenting), disallowed race discrimination by the University of Michigan College of Literature, Sciences and Arts because the magnitude of the preference was specified.

II. FROM PROHIBITING TO PERMITTING OR REQUIRING RACE DISCRIMINATION

A. *The Undoing of Title VI of the 1964 Civil Rights Act*

The legal question presented by *Grutter* and *Gratz* was not, or at least should not have been, a difficult one. Title VI of the 1964 Civil Rights Act prohibits race discrimination by any institution that receives federal funds.⁸ There was no doubt that the University of Michigan received federal funds or that it racially discriminated. Its violation of that statute was therefore clear, obviating any need or occasion to consider the question of constitutionality. This was the position taken by Justice Stevens, joined by Chief Justice Warren Burger and Justices William Rehnquist and Potter Stewart, when the Court first considered the question in *Regents of University of California v. Bakke* in 1978.⁹ But for their lack of one more vote, the era of race preferences would have come to an end. Justices William J. Brennan, Jr., Byron White, Harry Blackmun, and Thurgood Marshall, however, asserted, in an unusual

5. See *Green*, 391 U.S. at 441–42 (holding that elimination of racial discrimination in the operation of a school system did not constitute compliance with *Brown v. Board of Education*, 347 U.S. 483 (1954), because a high degree of integration did not result).

6. *Grutter*, 539 U.S. at 334–35.

7. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

8. 42 U.S.C. § 2000d (2000 & West Supp. 2004). Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." See *id.*

9. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360–61 (1978) (Stevens, J., concurring) (arguing that the admissions program plainly violated Title VI and a constitutional inquiry was not called for).

joint opinion, that Title VI was “cryptic,”¹⁰ and the ninth Justice, Lewis Powell, declared that it was “majestic.”¹¹ Despite these apparently contradictory readings, they reached the same conclusion: Title VI does not prohibit all race discrimination by federally funded institutions, despite what it plainly says and was unquestionably intended to mean. This was the first act of blatant judicial dishonesty from which all else in *Bakke* and now in *Grutter* followed. In a legal system seriously concerned with controlling judicial misbehavior, it would have been subject to sanction.

B. The Subversion of Brown

On the constitutional question, some background, unfortunately, is necessary. The modern constitutional law of race discrimination begins, of course, with the 1954 decision of *Brown v. Board of Education*, holding unconstitutional state statutes requiring the assignment of students to separate schools by race.¹² In a pointless attempt to avoid explicitly overruling the “separate but equal” doctrine of *Plessy v. Ferguson*,¹³ the Court purported to base the decision on a finding that racially segregated schools were “inherently unequal.”¹⁴ In a companion case, *Bolling v. Sharpe*,¹⁵ involving school segregation in the District of Columbia, in *Brown II*¹⁶ one year later, and in a series of non-school cases that quickly followed,¹⁷ the Court dropped the pretense and seemed to make clear that the Constitution was now to be understood as prohibiting all official race discrimination. The Court, however, was unable to enforce its constitutional prohibition, and uniquely in constitutional history, did not attempt to do so. For one thing, resistant states had the option of simply ending free (and compulsory) public school education and returning education, like most goods and services in a free market economy, to individual choice.¹⁸

10. *Id.* at 340 (Brennan, White, Marshall, & Blackmun, JJ., concurring).

11. *Id.* at 284.

12. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*].

13. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

14. *Brown I*, 347 U.S. at 495.

15. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

16. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

17. *See, e.g.*, *Gayle v. Browder*, 352 U.S. 903 (1956) (outlawing discrimination on buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (striking down discrimination on municipal golf courses); *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (outlawing discrimination in public beaches and bath houses).

18. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (disallowing the distribution of money grants to attend segregated private schools while the public schools of the county remained closed).

The Court, therefore, issued no order requiring compliance with *Brown*, and the following year in *Brown II* required compliance only “as soon as practicable,”¹⁹ which the states of the deep South understood to mean “never.”

The great contribution of *Brown* was that, though it did not end segregation, it gave impetus to a decade of efforts by others to do so. President Kennedy’s assassination, Dr. Martin Luther King’s civil rights marches, Lyndon B. Johnson’s presidency, and the generally recognized indefensibility of race discrimination by government led finally to the great 1964 Civil Rights Act.²⁰ The Act in effect ratified what Congress and everyone else understood to be the *Brown* principle—a prohibition against all official race discrimination—making it effective as to schools (Title IV)²¹ and extending it to all federally funded activities (Title VI),²² private employment (Title VII),²³ and places of public accommodation (Title II).²⁴ *Brown*, it appeared, had finally triumphed, and school segregation soon came to an end. The history of the law of race discrimination since the Act, however, is a history of both the *Brown* principle and the various provisions of the Act being stood on their heads.

School segregation ended in the South, but the residential racial concentration that is typical of all urban areas meant that “racially balanced” neighborhood schools would not be the result, any more than such schools existed in the rest of the nation. Spurred by civil rights organizations that had grown and prospered in the wake of *Brown* and riding a crest of moral acclaim, the Court decided to make an even more daring and much less justifiable move supposedly in the interest of racial equality. In *Green*, by holding unconstitutional the operation of a school district from which all racial discrimination had concededly been removed, because only limited racial integration resulted, the Court effectively changed the constitutional requirement from a prohibition of

19. *Brown II*, 349 U.S. at 300.

20. 42 U.S.C. § 2000 (2000 & West Supp. 2004). And then to the drastic but effective 1965 Voting Rights Act, 42 U.S.C. §§ 1971–1978 (2000 & West Supp. 2004), and the 1968 Civil Rights Act, 42 U.S.C. § 3601 (2000).

21. See 42 U.S.C. § 2000c–2000c-9 (2000) (defining all public schools as those institutions operated by a state, subdivision of a state, governmental agency, or using funds derived from a governmental source).

22. See 42 U.S.C. § 2000d–2000d-7 (2000) (ensuring no person be denied on the basis of color from participation in a program receiving federal funds).

23. See 42 U.S.C. § 2000e–2000e-17 (2000) (establishing the doctrine of Equal Employment Opportunity).

24. See 42 U.S.C. § 2000a–2000a-6 (2000) (stating that “all persons shall be entitled to full and equal enjoyment . . . of any place of public accommodation”).

segregation to compulsory integration, even though this meant not prohibiting, but *requiring* racial discrimination in school assignments.²⁵

For several reasons, the Court could not, however, openly announce a requirement of school racial integration and has always denied that there is such a requirement. For one thing, it would have been expected to state the benefits to be obtained from compulsory integration that would justify the costs, something it has never attempted to do. Further, a simple requirement of racially mixed schools would have immediately been applicable nationwide—to the schools of Chicago as well as Birmingham—and therefore met unified and undoubtedly successful resistance. Perhaps most important, the Court would have had to reject or at least qualify the *Brown* principle prohibiting all official racial discrimination, and tampering with *Brown* was the last thing it wanted to do. The Court avoided all these difficulties by simply insisting that it was not requiring integration as such, but something very different, “desegregation,” the ending and undoing of the segregation prohibited in *Brown*. The requirement therefore needed no further justification, would apparently apply only to the South, and instead of having to overturn or qualify *Brown*, the Court could claim to be actually enforcing it. Official racial discrimination was being required, it was true, but only to “remedy” official racial discrimination, fighting fire with fire.

The sole disadvantage of the Court’s claim to require race discrimination only to remedy race discrimination was that it was untrue. The requirement, the Court said in *Green*, was “a system in which racial discrimination would be eliminated root and branch,”²⁶ but racial discrimination, the lower courts found, the plaintiffs conceded,²⁷ and the Court did not question, had already been eliminated. That compulsory integration could not be justified as desegregation became even clearer in 1971 when the Court in *Swann v. Charlotte-Mecklenburg Board of Education*²⁸ required busing for racial balance in the giant Charlotte-Mecklenburg, North Carolina, School District. Charlotte-Mecklenburg’s schools were no more racially imbalanced and the imbalance was no more due to past segregation than the schools of, say, Los Angeles. While the Court held that federal judges could order racial assignment only for “desegregation,” to remedy *Brown*-prohibited

25. See generally GRAGLIA, *supra* note 2 (discussing the Court’s move from prohibiting to requiring racial discrimination in school assignments and the consequences of this development).

26. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

27. See *Bowman v. County Sch. Bd.*, 382 F.2d 326, 328 (4th Cir. 1967) (recognizing that the plaintiffs conceded their annual choice of schools is unrestricted).

28. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

segregation, it added as pure dictum that school boards were free to do so to increase racial integration for its own sake.²⁹ Two years later, the Court required the “desegregation” of the Denver, Colorado, school system which had never been segregated.³⁰ There could be no doubt that the requirement was simply racial balance or integration for its own sake, and that the Court’s insistence to the contrary was due to the fact that the remedy rationale was seen as the only possible way to justify race discrimination.

C. The Undoing of Titles IV and VII of the 1964 Civil Rights Act

Title IV of the 1964 Civil Rights Act also requires, just as the Court purports to, not integration as such, but only “desegregation.”³¹ The only difference is that the Court’s definition of “desegregation” is precisely the opposite of the Act’s. Title IV carefully defines “desegregation” as “the assignment of students to public schools . . . without regard to their race.”³² It then adds, redundantly, in a superabundance of caution, “but ‘desegregation’ shall not mean the assignment of students to public schools in order to overcome racial imbalance.”³³ The Act in effect repeats twice more that it is racial assignment and only racial assignment that is forbidden.³⁴

All to no avail. The utility and efficacy of law depends entirely on the good faith of those who apply the law—pre-existing authoritative rules stated in words—and, on issues of race, good faith on the part of the Court has been entirely lacking. In surely one of the boldest moves in its long history of bold moves, the Court simply declared that requiring that students be assigned to schools by race to increase integration was not inconsistent with Congress doing all it could to prevent precisely that.³⁵ Fears by southern Congressmen that Senator Hubert Humphrey, floor manager of the bill that became Title IV, dismissed as “bogeymen and hobgoblins” soon proved to be all too real.³⁶ It would be difficult to find a clearer example of persons free of external control assuming that their good intentions exempted them from the restraint of good faith.

29. *Id.* at 7.

30. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

31. 42 U.S.C. § 2000c (2000 & West Supp. 2004).

32. *See id.* at § 2000c(b).

33. *See id.*

34. *See id.* at § 2000c-9 (stating that “nothing . . . shall prohibit classifications and assignment for reasons other than race . . .”).

35. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17–18 (1971).

36. 110 CONG. REC. 6552 (1964).

What the Court did to Title IV of the 1964 Act in *Green and Swann* it did, in effect, to Title VII in *Griggs v. Duke Power Co.*³⁷ in 1971, by converting its prohibition of race discrimination in employment into a requirement of race discrimination by holding that employers may not use ordinary employment criteria, such as level of education, when the effect is to disproportionately disqualify blacks. In *United Steelworkers of America v. Weber*,³⁸ the Court held explicitly that Title VII does not prohibit discrimination against whites. Finally, and more to the present point, what the Court did to Title IV in *Green and Swann* and Title VII in *Griggs* and *Weber* it did to Title VI, as noted above, in *Bakke*, by permitting a federally funded institution to practice discrimination against whites.

III. BAKKE: JUSTICE POWELL'S ATTEMPT TO FIND A MIDDLE WAY BETWEEN PROHIBITING AND PERMITTING RACE DISCRIMINATION

According to *Green and Swann*, race discrimination is not only no longer prohibited but may actually be required in grade school assignments when supposedly necessary for “desegregation,” and according to *Swann*, it may at the option of school boards be required simply to increase integration. It is hardly surprising, therefore, that college and university administrators concluded that race discrimination is at least permissible in higher education. This was the conclusion of the Washington Supreme Court in 1974 when it upheld as constitutional the use of race preferences in granting admission to the University of Washington Law School.³⁹ The Supreme Court, after agreeing to review the case, dismissed it as “moot,”⁴⁰ with only Justice Douglas (never reluctant to decide a policy issue)⁴¹ reaching the merits in a dissenting opinion.⁴² Douglas, to the surprise of many, would have held the discrimination unconstitutional,⁴³ even though he was not successful in attempting to reconcile that conclusion with *Swann*.⁴⁴ It seemed clear, nonetheless, that race preferences in higher education would be

37. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

38. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

39. *DeFunis v. Odegaard*, 507 P.2d 1169 (Wash. 1973), *vacated by* 416 U.S. 312 (1974).

40. *DeFunis*, 416 U.S. at 319–20.

41. *See, e.g., Mora v. McNamara*, 389 U.S. 934, 935–39 (1967) (Douglas, J., dissenting) (presenting Justice Douglas’s willingness to decide the legality of the Vietnam War).

42. *DeFunis*, 416 U.S. at 320–49 (Douglas, J., dissenting).

43. *Id.* at 342 (Douglas, J., dissenting).

44. *Id.* at 343 (Douglas, J., dissenting); *see GRAGLIA, supra* note 2, at 261 (pointing out that the Court in *Swann* stated that school authorities could seek school racial balance for its own sake, not, as Douglas argued, only as a remedy for past segregation).

disallowed when the Court finally passed on the issue, for surely one could not expect to find five Justices to the left of Douglas, who was probably, along with Brennan, one of the two most liberal-activist Justices in our history.

The expectation proved incorrect when in *Bakke*, five Justices, after disposing of Title VI as merely replicating the Constitution, held that the Constitution does not disallow all race preferences.⁴⁵ The four Justices led by Brennan concluded that the Constitution does not prohibit discrimination disadvantaging whites to the same extent as discrimination disadvantaging blacks, and would have upheld such discrimination on the by-then well-established remedy rationale.⁴⁶ Although there was no evidence that the University of California at Davis Medical School ever discriminated against blacks, the four Justices would have upheld granting them preference as a remedy for “societal discrimination,”⁴⁷ on the apparent assumption that there could, after all, be no other explanation of the need for preference.

Justice Powell, faced with four Justices who would have totally disallowed and four who would have totally upheld the race preferences involved, sought, as was his wont,⁴⁸ a middle way, even though this meant, as usual, attempting to have it both ways. Race discrimination is race discrimination, he insisted, equally forbidden by the Equal Protection Clause regardless of the favored or disadvantaged racial group.⁴⁹ Finding “societal discrimination”⁵⁰ vague and indefinite enough to permit virtually any preference for blacks, but unwilling to disallow all preferences, he sought an alternative to the remedy rationale. The faculty and administration at Harvard University, Powell credulously believed, were clever enough to have had already discovered one: Educationally valuable “diversity,” which the Court should accept, he said, on the basis of the First Amendment’s protection of academic freedom.⁵¹ Harvard’s objective was not, it insisted, racial diversity as such, to simply increase, say, black enrollment—that, indeed, Powell said, would be “patently unconstitutional”⁵²—but to

45. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 285–87 (1978).

46. *Id.* at 324–26.

47. *Id.* at 310.

48. *See, e.g., Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 218 (1973) (Powell, J., concurring) (demonstrating that compulsory integration could not, as the Court claimed, be justified as a remedy for past official race discrimination, but then proceeding to justify it on just those grounds). For a detailed discussion, see GRAGLIA, *supra* note 2, at 185–90.

49. *Bakke*, 438 U.S. at 320.

50. *Id.* at 310.

51. *Id.* at 321–24.

52. *Id.*

obtain a student body with an educationally-valuable variety of experience and views.⁵³ Powell attached as an appendix to his opinion a copy of the “Harvard College Admissions Program,” fully endorsed it, and in effect raised it to the status of constitutional law.⁵⁴

The Harvard College Admissions Program is, unfortunately, as is almost necessarily true of attempts to justify race preferences, a compendium of lies and hypocrisies. The Program states, for example, that “scholarly excellence [is not] the sole”—as everyone no doubt thought—“or even predominant criterion” for admission to Harvard.⁵⁵ An “essential ingredient to the educational process” at Harvard, it appears, is “diversity.”⁵⁶ For years, the Program continues, Harvard sought diversity in terms of geography and special skills, talents, and experiences.⁵⁷ “The result,” for some unexplained reason, “was that very few ethnic or racial minorities attended Harvard College.”⁵⁸ Harvard College, therefore, “recently expanded the concept of diversity to include students from disadvantaged economic, racial, and other groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students.”⁵⁹ The result is that “the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may favorably tip the balance in other candidates’ cases.”⁶⁰

Each of these statements is false or misleading, beginning most basically with the pretense that the purpose of the program is to obtain educationally-relevant diversity. There can be no real doubt that the program would not have been instituted or have continued to exist except for that they felt the need to enroll more blacks. It is false that Harvard’s earlier pursuit of geographic or other diversity is the reason few blacks attended Harvard; the reason was that few met or came close to meeting Harvard’s admission standards. It is false that race preference programs are meant to aid the disadvantaged, very few of whom are in a position to apply to Harvard.⁶¹ If disadvantage were the

53. *Id.* at 322.

54. *Id.*

55. *Id.* at 321.

56. *Id.* at 322.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 323.

61. “[T]he Law School’s racial discrimination does nothing for those too poor or uneducated to participate in elite higher education” *Grutter v. Gratz*, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting).

concern, disadvantage would be the criterion. Race is not a proxy for disadvantage; not all and not only blacks have been disadvantaged. The University of Texas Law School, for example, never denied preferential admission to a black on the ground that he was not disadvantaged or was exceptionally advantaged, and it is unlikely Harvard ever did either.

It is false that discrimination on the basis of race can be compared with discrimination on the basis of geography or "life spent on a farm." Race discrimination is uniquely offensive and divisive, stereotype reinforcing, and inconsistent with the maintenance of a multiracial society, apart from having led to the Civil War and being the subject of three constitutional amendments. Ironically, it is critically and centrally false that race is considered only to "tip the balance" in close cases; the black/white test score gap is much too large to be bridged except by very large preferences.

The Harvard program goes on to speak, fantastically, of possibly having so many black applicants "who grew up in an inner-city ghetto [with] semi-literate parents" that it might give preference to a lower-scoring black child of a physician or even an exceptionally talented white.⁶² In fact, highly selective schools necessarily accept all or nearly all of the most highly qualified black students they can get in order to meet their self-imposed quotas or "goals" for black enrollment, very few of whom will come close to meeting their ordinary admission standards⁶³ and almost none of whom will be from a "ghetto" background. The fact that the alleged danger of getting a surplus of qualified blacks with a "ghetto" background has no relation to reality did not prevent Harvard from asserting it as a fact or Justice Powell from finding it impressive enough to make it the basis of American constitutional law on the subject of race preference.⁶⁴

Harvard, Justice Powell apparently convinced himself, had found a way not merely to justify race discrimination in higher education, but to make the fact of race discrimination disappear. Explicit, admitted race discrimination ceases to be race discrimination, he argued in effect, if it is (supposedly) immersed in enough discrimination on other grounds. An applicant who then "loses out" to another who receives "a 'plus' on the basis of ethnic background . . . will not have been foreclosed from

62. *Bakke*, 438 U.S. at 324. For a full discussion, see Lino A. Graglia, *Grutter and Gratz: Race Preferences to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of "Diversity,"* 78 TUL. L. REV. 2037 (2004).

63. See *infra* notes 107–30 and accompanying text (discussing disparities between black and white standardized test scores).

64. See *Bakke*, 438 U.S. at 321 (adding the Harvard College Admissions Program as an appendix to his opinion).

all consideration . . . simply because he was not the right color or had the wrong surname.”⁶⁵ Whether or not he is foreclosed, the fact obviously remains that he will be at a disadvantage, and in practice a very large disadvantage, “because he was not the right color or had the wrong surname.”⁶⁶

The “principal evil” of an unconstitutional “quota” program, Powell correctly pointed out, is its “denial . . . [of an applicant’s] right to individualized consideration without regard to his race.”⁶⁷ But that, of course, is exactly the right that the Harvard program denies to applicants. The whole point of the program is to consider each applicant *with* regard to his race. Under the Harvard program, Powell incredibly concluded that non-preferred applicants whom were rejected “have no basis to complain of unequal treatment under the Fourteenth Amendment.”⁶⁸ Rejected white and Asian applicants must understand that they are not victims of race discrimination despite the fact that they, like plaintiffs Grutter and Gratz, would have been admitted if they were of a preferred race. All Powell has succeeded in demonstrating is the logician’s dictum that from self-contradiction all conclusions follow and that in constitutional law arguments are acceptable that would be considered ludicrous in a discipline that aspired to the level of intellectual integrity of, say, astrology.

IV. *GRUTTER*: JUSTICE POWELL’S ILLOGICAL *BAKKE* OPINION IS MADE AN OPINION OF THE COURT

Defects in logic and misstatements of fact do not lessen the authoritative nature of Supreme Court decisions in the make-believe world of constitutional law, a consequence of the inestimable advantage of being subject to no review.⁶⁹ Illogical or not, Powell’s *Bakke* opinion settled for the nation as a whole for a quarter of a century the enormously important question of race preferences in higher education. Since the effect of *Grutter* is to raise the Powell opinion to the status of an opinion of the Court, it will now seemingly settle it for at least another quarter of a century.⁷⁰ There was apparently nothing about the

65. *Id.* at 318.

66. *But see id.* (insisting that a white applicant’s qualifications have been weighed fairly despite not receiving a “plus” such as his minority counterpart would have received).

67. *Id.* at 318 n.52.

68. *Id.* at 318.

69. “We are not final,” Justice Robert Jackson famously pointed out, “because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

70. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (expressing the expectation that

Powell opinion or the Harvard program it is based upon that the *Grutter* Court did not find convincing. So persuasive did Justice O'Connor find Powell's argument that an applicant who loses out to another whose race was a "'plus' factor," and who clearly would have been accepted if he had that "plus," has no claim of race discrimination that she quoted in full.⁷¹

A. The "Diversity" Fraud

The fundamental and overarching falsehood of *Grutter*, as of the Harvard program and the Powell opinion it is based upon, is the pretense that the purpose of race preference admission programs in higher education is to obtain an educationally-valuable diversity of opinion in the student body—so valuable as to justify putting state officials into the business of classifying people by race for disparate treatment and the very substantial lowering of academic standards necessarily involved. It is probably safe to say that no minimally informed person really believes this,⁷² although some academics are willing to proclaim it, at least as a debating point.⁷³ It is inherently

preferences will not be needed in twenty-five years).

71. *Id.* at 341 (quoting *Bakke*, 438 U.S. at 318).

72. *See, e.g.*, Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 407 (1979) (asserting that "[t]he *raison d'être* for race-specific affirmative action programs has simply never been diversity for the sake of education"); Brian P. Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL'Y 385, 395–96 (2003) (noting that many members of the academic establishment actually support affirmative action for reasons of social justice, not the educational benefits of diversity); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979) (stating "I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students."); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 63 (2003) (noting that diversity has "displayed little or no relationship to the actual reasons why affirmative action had become prominent in American higher education"); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) (arguing that "[e]veryone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued. (Why no preferences for fundamentalist Christians or for neo-Nazis?)"); Daniel Golden, *Some Backers of Racial Preference Take Legal Stand Beyond Diversity: Society Wins with Integrated Elite*, WALL ST. J., June 14, 2003, at B1 (quoting Columbia Law School Professor Samuel Issacharoff, who said, "[t]he commitment to diversity is not real. None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.").

73. *See, e.g.*, Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479 (1999) (differentiating diversity and affirmative action and arguing that a policy of diversity is fair and constitutional in law school admissions). *But see* Lino A. Graglia, *Professor Loewy's Defense of Racial Preference: Defining Discrimination Away*, 77 N.C. L. REV. 1505 (1999) (responding to Loewy's distinction between diversity and affirmative action and asserting that policies of

implausible that adding a few less-qualified blacks, overwhelmingly of middle or upper-middle class background, to a classroom or campus at a selective school will significantly contribute to their classmates' education. It is much more likely to lead to or reinforce the view that even advantaged blacks are not fully academically competitive. The best available, if not the only, actual empirical study of the issue, quoted by Justice Thomas⁷⁴ but ignored by Justice O'Connor, reached the more plausible conclusion that race preferences are harmful to education.⁷⁵

Former University of Michigan law dean Terence Sandalow, a proponent of race preferences, has pointed out that any differences between whites and blacks in experience "are simply irrelevant to most of what students study in the course of their undergraduate courses," not only to mathematics and the natural sciences, but also to "most of the humanities and social sciences":

[E]ven though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so.⁷⁶

Yale law professor Peter Schuck commented, this "accords precisely with my own experience,"⁷⁷ as it does also with mine, in many years of teaching a course on race discrimination.

B. The Real Reasons for Racial Preferences in Selective Institutions of Higher Education

Race preferences were not instituted at selective schools beginning in the late 1960s because of a new pedagogical theory or discovery as to the educational benefits of increasing a school's black enrollment. They were instituted at that time because the *Green* and *Swann* decisions

diversity have nothing to do with obtaining educational benefits).

74. *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting) (citing Stanley Rothman et al., *Racial Diversity Reconsidered*, 151 THE PUBLIC INTEREST 25 (2003)).

75. According to Stanley Rothman:

[T]he greater the school's diversity, the less students were satisfied with their own educational experience. In addition, greater diversity was associated with perceptions of less academic effort among students and a poorer overall educational experience. Finally, enrollment diversity was positively related to students' experience of unfair treatment, even after the effects of all other variables were controlled.

Stanley Rothman et al., *Racial Diversity Reconsidered*, 151 THE PUBLIC INTEREST 25, 36 (2003).

76. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 167 (2003).

77. *Id.*

made clear that they could be—because not all official race discrimination was necessarily prohibited, as everyone thought—and because they served several interests. For academic liberals—the overwhelming majority at elite institutions⁷⁸—race is a club with which to beat up on America. It is the indispensable element of their self-imposed mission to point out the nation's shortcomings; for them, the race issue simply cannot be permitted to go away.⁷⁹ In addition, many persons who found gainful and satisfying employment in the many civil rights organizations that grew up and prospered in the wake of *Brown* were not about to give it up merely because the battle against segregation had been won; for them, a new “advance” in civil rights would always be needed.

Most important for elite schools is that race neutrality, it became painfully obvious, could prove to be a political and ideological embarrassment. No blacks attended segregated institutions of higher education because none could be admitted, and few attended non-segregated institutions because, supposedly, of widespread racial discrimination. But why did none or so few attend after segregation ended and official and public discrimination were prohibited? The argument based on the continuing burdens of past discrimination, even for clearly advantaged blacks, became less persuasive with each passing year. The continuing absence of blacks at elite institutions became increasingly difficult to explain. Race preferences became necessary to spare those institutions from the by-then devastating charge of being “all-white” or, even worse, “lily-white” institutions. The extraordinary academic success of Asian students⁸⁰ removed any danger of elite

78. See, e.g., Karl Zinsmeister, *The Shame of America's One-Party Campuses*, AM. ENTERPRISE, Sept. 2002, at 18 (discussing the results of a study that shows most faculty at colleges and universities identify themselves as liberal).

79. Cf. Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet the Needs of African-Americans*, 3 HEALTH MATRIX 127, 133 (1993) (“Given the fact that the pervasive nature of racism in American society affects African-Americans at all economic levels, there cannot be ‘complete . . . mental and social well-being’ for African-Americans until the problem of racism in society is addressed and resolved.”); Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 70 (1999) (“White society must continue to take affirmative steps to equalize the racial imbalance in America, or give up its image as an anti-racist society altogether.”).

80. See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE 399–400 (1997).

Just 3.5 percent of the population in 1995, Asians were 13 percent of all students scoring 700 or more on the verbals and a stunning 27 percent of those with 750 and up in math. If we look at a still more rarified level of achievement—at the 734 superstar students named Advanced Placement Scholars by the College Board in 1995 because they had high grades on eight different AP tests—the picture is still more dramatic. An amazing 29.7 percent of all the winners were Asians, and 53.1 percent were non-

institutions being all-white, but not of their real concern, being virtually all non-black.

The reality at the root of race preference programs in higher education is that very few blacks meet the ordinary admission standards of elite schools, and this is seen by liberal academics as both unchangeable and politically and ideologically intolerable. We have race preferences, as Derek Bok, former president of Harvard,⁸¹ stated more candidly than Justice O'Connor could, because their elimination would mean "a severe drop in the number of black students, especially at more selective colleges and universities."⁸² The result would be to "reduce black enrollments to 1.5 percent or less [not merely the 4 percent O'Connor referred to in *Grutter*] in scores of selective colleges and professional schools."⁸³ This was a problem, he asserted, not because it would embarrass Harvard liberals—himself as president very much included—but because it would have "a devastating effect on the morale and aspirations of blacks."⁸⁴ Why anyone should be devastated because he was denied admission to an institution for which he does not meet the ordinary admission standards, Bok did not explain. Since denial of admission to a highly selective school usually means attendance at a less selective school for which the applicant is better qualified, the effect is probably to lessen or avoid injury to morale and aspiration.

*C. Justice O'Connor's Previous Insistence
on "Strict Scrutiny" for All Official Race Discrimination*

Racial preferences were instituted by law schools and medical schools in the 1960s, Professor Robert Sedler, a long-time proponent of racial preferences, has pointed out, "not to obtain a racially diverse student body," but simply to increase the enrollment of blacks and other racial minorities who were "under-represented" in the legal and medical professions.⁸⁵ The only way this could be justified, it was thought, was

Hispanic Whites. Just 2 out of the 734—less than 0.3 percent—were African-American.

Id.

81. Derek Bok later co-authored the leading defense of race preferences in higher education (WILLIAM G. BOWDEN & DEREK C. BOK, *THE SHAPE OF THE RIVER* (1998)), which was cited in *Grutter*, 539 U.S. 306, 330 (2003).

82. Derek Bok, *Admitting Success*, *NEW REPUBLIC*, Feb. 4, 1985, at 15.

83. Bok, *supra* note 82, at 39. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003) (noting that the elimination of race as a factor in the admission process would reduce the percentage of underrepresented minority students from 14.5% to 4% of the entering class in 2000).

84. Bok, *supra* note 82, at 39.

85. Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*,

on the basis of the so-called “remedy” rationale established in the grade school context, even though the racial discrimination supposedly being remedied might be hard to find. All that was necessary was to adopt the fundamental liberal assumption that any black shortcoming must be the result of racial discrimination, with no further evidence needed.

This was the position taken, as would be expected, by the Brennan-led four Justices in *Bakke*. The need to find race discrimination requiring remedy, in the absence of any evidence of such discrimination by the University of California at Davis Medical School, was supplied by relying on “societal discrimination.”⁸⁶ Justice Ginsburg’s concurring opinion in *Grutter*, joined by Justice Breyer, took essentially the same position,⁸⁷ and Justices Stevens and Souter are clearly also willing to take such a position.⁸⁸ The only reason the justification for race preferences in higher education moved from the conventional, though baseless, remedy rationale to the ludicrous diversity rationale is that the “conservative” Justice Powell was unwilling to accept a rationale that would justify any preference for blacks—indeed, it is “patently unconstitutional,” he insisted, to discriminate simply to increase black “representation”—but also unwilling to insist on the invalidation of all preferences for them. In effect, his position was that discrimination against whites is as equally prohibited as discrimination against blacks, except that if done subtly enough—as by those clever folks at Harvard—just a little would be okay.⁸⁹ This self-contradictory position became the position of the Court in *Grutter* because the similarly “conservative” Justice O’Connor had essentially trapped herself into adopting it, whether she agreed with it or not.

Justice O’Connor was the author of the Court’s two leading opinions invalidating race preferences, *Richmond v. J. A. Croson Co.*⁹⁰ and

92 KY. L.J. 219, 219 (2003–04) (emphasis in original).

86. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 328 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

87. *Grutter v. Bollinger*, 539 U.S. 306, 345–46 (2003) (Ginsburg, J., concurring) (asserting that the continued existence of conscious and unconscious racial bias and discussing the inadequate and unequal opportunities for minority students).

88. See *Gratz v. Bollinger*, 539 U.S. 244, 296 (2003) (Souter, J., dissenting) (Souter joining Justice Ginsburg’s dissenting statement that “government decisionmakers may properly distinguish between policies of exclusion and inclusion”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (stating that “[r]emedial race-based preferences reflect . . . a desire to foster equality in society”).

89. See *Bakke*, 438 U.S. at 316–19 (referring to the Harvard College program as an “illuminating example” of a university admissions program that considers a combination of applicant characteristics, including race).

90. *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

Adarand Constructors, Inc. v. Peña.⁹¹ In them, she emphatically insisted, over impassioned dissents, that “strict scrutiny” applies to all official race discrimination,⁹² and that the remedy rationale requires substantial evidence of racial discrimination by the institution using race preferences.⁹³ She had, therefore, effectively precluded herself from holding otherwise in *Grutter*.⁹⁴ As the swing vote, she was in a position to make the four committed liberals purport to agree with the untenable proposition that a state has a compelling interest, as strict scrutiny requires, in racially discriminating in order to obtain educationally valuable “diversity” in an elite state law school, even though as true liberals they are ideologically committed to the view that strict scrutiny is not applicable—no compelling interest is necessary—when a state is discriminating in favor of blacks.

The liberal position that official discrimination meant to advantage blacks should be treated more leniently than discrimination disadvantaging them is neither illogical nor necessarily prohibited by the holding of *Brown*, which involved only the latter. There is no escaping its inconsistency, however, with the 1964 Civil Rights Act, each title of which applies and was meant to apply to all race discrimination.⁹⁵ It also deprives what everyone, including Congress, understood to be the *Brown* principle—government may not treat people differently on the basis of race—of the seeming moral stature and appeal that made it irresistible. It seemingly converts the principle into a matter of ad hoc policy preference subject to the powerful and frequently quoted, including by Justice Powell in *Bakke*, criticism by Alexander Bickel:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for

91. *Adarand*, 515 U.S. at 200.

92. *Id.* at 237; *Croson*, 488 U.S. at 493.

93. *Croson*, 488 U.S. at 505.

94. See *Adarand*, 515 U.S. at 237 (applying “strict scrutiny” to use of racial preference in federal government contracting); *Croson*, 488 U.S. at 493, 505 (applying “strict scrutiny” to use of race preference in city contracting).

95. See GRAGLIA, *supra* note 2, at 46–66 (discussing that the purpose of the Civil Rights Act of 1964 was to prohibit racial discrimination in education, employment, public accommodations, and federally assisted programs).

equality, they now claim support for inequality under the same Constitution.⁹⁶

The relatively conservative instincts of Justices Powell and O'Connor on race issues probably caused them to be attracted to Bickel's view, but they both also seemed emotionally opposed to taking a clear and simple position on almost any issue. It was probably too much to expect O'Connor to flatly condemn race preferences, bucking the virtually unanimous view of the liberal academic establishment, especially when even the Bush administration was unwilling to do so. To have done so would have been to lose all academic respectability and be reduced, like Justices Scalia and Thomas, to figures of scorn and calumny in liberal academia. Further, O'Connor's willingness to join the four liberals on especially important issues makes her arguably the most important person in the country,⁹⁷ probably not an uncomfortable or unwelcome position.

D. The Non-Distinction Between Seeking a Racial "Critical Mass" and Seeking Increased Racial Representation

Given that the basic premise of *Grutter*—that the purpose of race preferences in admission to elite schools is academic diversity—is false, it is not surprising that almost every statement made to explicate and justify it is also false. A typically illogical example is the Court's acceptance of the law school's argument, essential to the decision, that it was not seeking to enroll any particular number of blacks—that would be a clearly impermissible "quota"—but merely to obtain a "critical mass" of blacks in each entering class.⁹⁸ All representatives of the school adamantly refused to define "critical mass" in terms of any number or percentage or range of numbers or percentages on the theory, apparently, that seeking a "critical mass" of something does not involve seeking any number or percentage as long as none are admitted. The result was that "critical mass" was defined only as a group large enough that individual members would "not feel isolated or like spokespersons for their race"⁹⁹ and would contribute the group's presumed unique

96. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).

97. Justice O'Connor, but not Chief Justice Rehnquist or Secretary of Defense Donald Rumsfeld, for example, is listed in a recent *Time* magazine article as one of the 100 most influential people in the world. See Michael Elliot, *The People Who Shape Our World: Our List of Those Whose Power, Influence or Moral Example Touches the Lives of All of Us, Right Now*, *TIME*, Apr. 26, 2004, at 50 (listing Justice O'Connor as a person who shapes our world); Walter Isaacson, *Sandra Day O'Connor: Good Sense, Swing Vote*, *TIME*, Apr. 26, 2004, at 104 (noting O'Connor's importance as a swing voter on the Court).

98. *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003).

99. *Id.* at 319.

perspective and yet show, paradoxically, that members had no one perspective.

Chief Justice Rehnquist had no difficulty demonstrating that the “critical mass” argument is a “sham.”¹⁰⁰ The number of applicants admitted from each of the preferred groups, “African-American,” “Hispanic,” and “Native American,” followed closely, he showed, that group’s percentage of total applications.¹⁰¹ It could hardly have been more clear that the school was simply seeking proportional “representation” of each preferred group, which the Court insisted, as had Powell, is “patently unconstitutional.”¹⁰² “[O]ne would have to believe,” Chief Justice Rehnquist pointed out, that a “critical mass” could be “achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans.”¹⁰³ Indeed, in one year, just three was enough for Native Americans.¹⁰⁴

E. The Reality of Poor Black Academic Performance

Closely related to the pretense that the purpose of race preference programs is not simply to increase black enrollment is the pretense that each applicant is given “truly individualized consideration” and put into “competition for admission” with all other candidates, with “race or ethnicity” considered “only as a ‘plus’ in a particular applicant’s file.”¹⁰⁵ The fact is that selective schools have race preference admission programs only because blacks as a group are not academically competitive with whites and Asians, and the academic gap is much too large to be closed by using race “only as a ‘plus’” factor. The reality that is at the basis of race preference programs in selective institutions of higher education is that:

At least in America, the average white child scores about 15 points higher on standardized tests than the average black child. This disparity is apparent among first graders, and it persists throughout school and college. In terms of mental ages or grade levels, blacks fall further and further behind whites. The average black 6 year old is 1 year behind the average white 6 year old. By the time he is 12, the average black child is scoring at the same level as the average white

100. *Id.* at 383 (Rehnquist, C.J., dissenting).

101. *Id.* at 383-85 (Rehnquist, C.J., dissenting).

102. *Id.* at 329-30; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978).

103. *Grutter*, 539 U.S. at 381 (Rehnquist, C.J., dissenting).

104. *Id.* at 381 n.* (Rehnquist, C.J., dissenting) (characterizing the law school’s assertion that the enrollment of three Native Americans would constitute a “critical mass” as “absurd”).

105. *Id.* at 334.

10 year old. The average black 18 year old has scores comparable to a white 14 or 15 year old.

These differences are quite consistent on both IQ and achievement tests. Some studies report racial differences of less than 15 points, while others report more, but virtually none report anything like equal performance.¹⁰⁶

It is an artifact of a normal, bell-shaped curve distribution that a small difference in median scores makes for large differences at the extremes, and a fifteen percent difference, exceeding a standard deviation, is not small. One effect of the difference at the lower end of the distribution is that only eleven percent of blacks have an intelligence quotient ("IQ") of 100 or more, compared to fifty percent of whites.¹⁰⁷ At the upper end, of more relevance to higher education, 2.32% of blacks score at or above 110, compared to 30.9% of whites; and 0.32% of blacks score at or above 120, compared to 13.4% for whites.¹⁰⁸ An IQ of 110 may be taken, very conservatively (120 is more realistic, at least for selective schools), as the minimum required for admission to a graduate or professional school.¹⁰⁹ Given that blacks make up about 13% of the American population and achieve an IQ of 110 at a rate less than one-tenth the rate of whites, they cannot be expected to make up more than 1.3% of admissions to graduate and professional schools.

For the average black twelfth grader performing at about the level of the average white or Asian eighth grader in reading and math,¹¹⁰ obtaining a high school education is difficult enough, to say nothing of gaining admission to a selective college. The average black college applicant has a combined Scholastic Assessment Test ("SAT") score about 200 points lower than the average score of whites and Asians.¹¹¹

106. CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 81-82 (1972); MICHAEL LEVIN, *WHY RACE MATTERS* 34-37 (1997). See also generally RICHARD J. HERNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 276-80 (1994) (confirming the existence of a difference in the performance of blacks and whites on tests of cognitive ability).

107. Linda S. Gottfredson, *Reconsidering Fairness: A Matter of Social and Ethical Priorities*, 33 *J. VOCATIONAL BEHAV.* 293, 301-02 (1988).

108. *Id.*

109. See *id.* at 303 (stating that an IQ score of 115 is generally considered necessary to get the "grades that would qualify one for admission to a professional and graduate school").

110. See, e.g., THERNSTROM, *supra* note 81, at 354, 357 (illustrating "the immense racial gulf in cognitive skills between white and black children"). In 1994 "the average African-American high school senior had math skills precisely on a par with those of the typical white in the middle of the ninth grade," and "blacks aged seventeen could read as well on the average as the typical white child who was a month past his or her *thirteenth* birthday." *Id.*

111. WILLIAM G. BOWEN & DEREK C. BOK, *THE SHAPE OF THE RIVER* 20 (1998). "In 1982 selective colleges were as likely to admit a black student with total SAT scores of 1100 and a B+ average as they were to admit a white student with total SAT scores of 1300 and an A-

In 1995, blacks from families earning \$50,000 or more scored lower than whites from families earning \$10,000 or less. Contrary to Justice O'Connor's fanciful claim that race preferences can be expected to end in twenty five years because of black academic improvement,¹¹² the gap in SAT scores is not narrowing but increasing, having gone from 187 points in 1993 to 206 in 2003.¹¹³

The size of the qualification gap that must be bridged to admit a substantial number of blacks to selective graduate and professional schools is, of course, at least as great. blacks make up more than ten percent (about 9,500 out of 90,000) of annual takers of the Law School Admissions Test ("LSAT"), for example, but very few score at the highest levels. In the 2001-02 school year, the number of blacks scoring at or above the 91.3 percentile with a college grade point average ("GPA") of 3.50 or better was twenty-nine.¹¹⁴ That is fewer blacks than the Harvard Law School alone enrolls, but the median score at Harvard and the nation's other half-dozen most selective law schools is at about the 98th percentile with a GPA of 3.75,¹¹⁵ at which level the

average . . . [W]e doubt that the extent of racial preferences changed much between 1982 and 1995." Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in *THE BLACK-WHITE TEST SCORE GAP* 1, 37 (Christopher Jencks & Meredith Phillips eds., 1998) (citing Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431, 437) "In fact, African-American applicants enjoy an advantage equivalent to . . . 400 points on the SAT." Kane, *supra*, at 432.

112. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

113. See Press Release, College Board, SAT Verbal and Math Scores Up Significantly as Record-Breaking Number of Students Take the Test: Average Math Score at Highest Level in More than 35 Years at 11 (Aug. 26, 2003) (reporting that in 1993 blacks scored an average of 850 (429 verbal, 421 math) while whites scored a total of 1037 (520 verbal, 517 math) and reporting that in 2003 blacks scored an average of 857 (431 verbal, 426 math) while whites scored an average of 1063 (529 verbal, 534 math)).

114. LAW SCHOOL ADMISSION COUNCIL, NATIONAL STATISTICAL REPORT, 1997-98 TO 2001-02 (2003).

115. See Harvard Law School, *J.D. Admissions Facts and Statistics*, at <http://law.harvard.edu/admissions/jd/HLSfaqs.php> (last visited Sept. 4, 2004) (stating, that for the entering class of 2003, ten percent of the 553 total students enrolled were black/African-American and reporting that the 75/25 percentile GPAs for the class of 2003 were 3.94/3.76 and the 75/25 percentile LSATs were 174/169); see also Columbia Law School, *Class Profile: Class of 2006*, at http://law.columbia.edu/prosp_students/jd_prog/applic_inf/Class_Profile.html (last visited Sept. 4, 2004) (reporting that out of 395 admitted and enrolled students the total minorities enrolled comprised thirty-one percent of the class and of those minorities, a total of forty, or ten percent of the class, was black/African-American, and reporting that the median LSAT was 170 and the median undergraduate GPA was 3.68); Georgetown Law School, *Frequently Asked Questions*, at <http://www.law.georgetown.edu/admissions/faq.html> (last visited Sept. 4, 2004) (noting that for the entering class of 2003 the median undergraduate GPA was 3.64 and the median LSAT was 169 and twenty-six percent of the class was an ethnic minority); Stanford Law School, *J.D. Program Admissions*, at <http://www.law.stanford.edu/admissions/jd/admissions.html> (last visited Sept. 4, 2004) (noting that the 170 members of the Class of 2005 were drawn from the upper five percent of their undergraduate class and the upper five percent of the LSAT pool);

number of black applicants approaches zero. Former Harvard President Derek Bok's estimate that if not given preference, the number of blacks at selective schools could be expected to drop to less than 1.5% was, if anything, an overstatement.

Harvard and nearly all other elite schools consider it politically and ideologically necessary, however, to enroll a much more substantial number of blacks, at least 5–10% of the entering class. It is preposterous to purport to believe that this can be done by tipping balances in favor of blacks in close cases. It can only be done by a process of "race-norming," whereby blacks are made to compete only with other blacks, and admitting virtually all of the highest scoring blacks until the desired number is reached, while hundreds of better qualified, separately-considered whites and Asians are passed over.

Because the basic purpose of the programs is to make it appear that blacks can qualify for admission to selective schools, the schools necessarily make every effort to keep the public uninformed or, even better, like the Harvard College Admissions Program, misinformed as to what they are doing. But litigation forces them to make some disclosure. A table Justice Powell included in his *Bakke* opinion showed that regular admittees had an average score at the 76th percentile on the quantitative section of the Medical College Admission Test, while the average score of the racially preferred (probably inflated because it included some Asians) was at the 24th percentile.¹¹⁶ The schools nonetheless invariably insist that the racially preferred admittees are "fully qualified," even if not the most qualified. The Fifth Circuit opinion in *Hopwood v. Texas* states that at the University of Texas Law School the presumptive admit score for blacks and Mexican-Americans was *lower* than the presumptive reject score for whites and Asians.¹¹⁷ At the University of Michigan, "the advantage of being

University of California Berkeley Boalt School of Law, *Frequently Asked Questions*, at <http://www.law.berkeley.edu/prospectives/admissions/jddegree/faq.html> (last visited Sept. 4, 2004) (reporting that in an average class size of between 270 and 280 for the past several years, the median GPA and LSAT score of admitted applicants has been between 3.7–3.8 and 167–169, respectively); Yale Law School, *J.D. Summary of Yale Law School Applicants for 2001, 2002, 2003*, at <http://www.law.yale.edu/outside/html/Admissions/admis-jdoverview.htm> (last visited Sept. 4, 2004) (summarizing applicant and admitted student numbers where the bulk of admitted students from 2001–03 had an LSAT score between 165 and 180 and a GPA of 3.75 or better but failing to mention the ethnic composition of each entering class); cf. KATHRYN HOFFMAN ET AL., NAT'L CENTER FOR EDUCATION STATISTICS, U.S. DEPT. OF EDUCATION, STATUS AND TRENDS IN THE EDUCATION OF BLACKS 96 (Sept. 2003) (reporting that in 1999–2000 only about five percent of blacks earned doctoral degrees and only seven percent of blacks earned first professional degrees).

116. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277 (1978).

117. *Hopwood v. Texas*, 78 F.3d 932, 936 (5th Cir. 1996).

black, Hispanic, or Native American is even greater than [400 SAT points]; they receive the equivalent of a full point of GPA,” with the result that “minority status” may “override any SAT score deficit.” Further, “the odds of a black student being admitted compared to a white student with the same SAT and GPA were 173 to 1 at Michigan”¹¹⁸

Justice O’Connor attempted to obscure the magnitude of the preference given blacks and only blacks by stating that the law school “frequently accepts non-minority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected.”¹¹⁹ She based this on the law school’s claim that “[s]ixty-nine minority applicants were rejected between 1995 and 2000” with scores higher than those of some whites and Asians who were admitted.¹²⁰ O’Connor found the argument impressive enough to retain even after Chief Justice Rehnquist pointed out that the correct number was sixty-seven and that fifty-six of them were Hispanic, and only six were black.¹²¹

The figures showed, incidentally, that while Hispanics were strongly preferred to whites and Asians, they were strongly disfavored with respect to blacks. In 2000, when twelve blacks and twelve Hispanics applied with LSAT scores of 159–160 and GPAs of 3.00 or better, all of the blacks, but only two of the Hispanics were admitted.¹²² In the same year, one of sixteen Hispanics and fourteen of twenty-three blacks were admitted with LSAT scores of 151–153 and a 3.00 GPA.¹²³ None of this data was sufficient, apparently, to give O’Connor and those who joined her opinion a clue that the purpose of the program was to enroll more blacks.

F. The False Promise of a Constitutional Time Limit on Race Preferences

Equally misleading is Justice O’Connor’s statement that in the twenty-five years since *Bakke*, “the number of minority applicants with high grades and test scores has indeed increased.”¹²⁴ She retained this statement in the face of Justice Thomas’s opinion pointing out the

118. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 20 (2002).

119. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

120. Brief for Respondent at 10, *Grutter*, 539 U.S. 306 (No. 02-241).

121. *Grutter*, 539 U.S. at 382 (Rehnquist, C.J., dissenting).

122. *Id.* (Rehnquist, C.J., dissenting).

123. *Id.* (Rehnquist, C.J., dissenting).

124. *Id.* at 343.

absence of “any evidence that the gap in credentials between black and white students is shrinking”¹²⁵ and that the percentage of black applicants scoring 165 or higher on the LSAT¹²⁶ did not increase between 1993 (1.1%) and 2000 (1.0%).¹²⁷ The absolute number of blacks with high LSAT scores increased between 1984 and 2000 only because a much larger number took the test.¹²⁸ As noted above,¹²⁹ the black/white SAT score gap is widening, not closing.

G. Obtaining the “Highly Qualified” by Preferring the Less Qualified

An argument thought by many to have had a particular influence on the *Grutter* decision is that the military needs a “highly qualified, racially diverse officer corps.”¹³⁰ If “highly qualified, racially diverse” is not an oxymoron, it is at least a joining of concepts in conflict when diversity is achieved by race preferences. To the extent that the officer corps is “racially diverse” (has more blacks) because of race preferences—which is all that is at issue—it will, by definition, be less highly qualified. The argument frequently heard that soldiers need or want leaders “who look like them,” if taken seriously, leads in the direction of a return to a segregated military. Looking at the argument from the ground up, it seems unlikely that soldiers in the field would prefer a commander “who looks like them” to a better qualified one of a different race.

V. CONCLUSION: A FRAUDULENT DEFENSE IS EVIDENCE OF INDEFENSIBILITY

An element of pretense is undoubtedly inevitable in judicial opinion writing. Decisions are ideally shown to result from the impersonal application of pre-existing authoritative rules, when in fact there rarely are such rules as to issues reaching the Supreme Court, or as in *Grutter*, the rules seem to require the opposite of the desired result. Judicial opinion writing is, therefore, something of a game, and one cannot expect judges to abide by standards of candor applicable in truth-seeking academic disciplines. Judges are, after all, only lawyers, trained in the manipulation of language to reach pre-determined results,

125. *Id.* at 375–76 (Thomas, J., dissenting).

126. *Id.* at 376 n.14 (Thomas, J., dissenting) (stating that a score of 165 was “the relevant score range for applicant consideration (absent race discrimination)”).

127. *Id.* at 375–76 (Thomas, J., dissenting).

128. *Id.* at 376 n.15 (Thomas, J., dissenting).

129. *See supra* note 114 and accompanying text (noting the widening gap between black test scores and those of whites and Asians).

130. *Grutter*, 539 U.S. at 331.

and inured to the unembarrassed assertion of fiction. There should nonetheless be some limit, some requirement of minimal honesty, on what even judges are permitted to say, unless the entire legal system is to degenerate into a farce. By purporting to believe that the purpose of the University of Michigan Law School's racially discriminatory admissions program was to serve a "compelling interest" in obtaining an educationally valuable student "diversity"¹³¹ and that black applicants were not put on "separate admission tracks,"¹³² the Court takes the use of patent falsehood and hypocrisy beyond those limits.

Officials remote from external control—of which Supreme Court Justices are the American paradigm—are inevitably tempted to believe that their assumed exceptional wisdom and benevolence exempts them from moral constraints. The point of generally accepted moral principles is to warn judgment away from this temptation. If honesty is not always, it is at least usually, the best policy. The fact that something can only be done dishonestly is a good indication that it probably should not be done and is not likely to have good long-term results. Racially preferential admission to selective colleges and universities is a policy that seems to have almost everything to be said against it, most of which is said in Justice Thomas's dissenting opinion, and little to be said for it. That the Court could only justify it dishonestly is strong evidence that it cannot be justified.

Racially preferential admission to institutions of higher education are overwhelmingly opposed by the American people, and rejected by them at every opportunity.¹³³ How, then, can they continue to exist in a supposedly democratic system of government? The answer, of course, is that they are ardently and almost unanimously favored by the liberal academic establishment which controls the universities and the media, and which has no difficulty in assuming the superiority of its views on public policy to those of the American public. For an academic to openly oppose racial preferences today would be virtually to disqualify himself from a high administrative position at a major university. He

131. *Id.* at 328.

132. *Id.* at 334–36.

133. See Associated Press, *Poll: Split on College Affirmative Action* (April 28, 2003), available at http://www.usatoday.com/news/nation/2003-04-28-affirmative-action_x.htm (discussing a poll finding that sixty-four percent of Americans believe that "minority students should not be admitted to a school if their grades and test scores didn't meet the level of other applicants . . ."); Gary Langer, *Assistance, But Not Preference: Poll: Most Share Bush's View on Affirmative Action* (Jan 27, 2003), available at http://abcnews.go.com/sections/us/DailyNews/poll_affirmativeaction030127.html (discussing an ABC News/Washington Post poll finding that sixty-six percent of Americans oppose preference programs and thirty percent support preference programs).

would never make it past the search committees, the membership of which is itself invariably the result of race preferences. On this issue as on all or nearly all others in the “culture war,” liberal academia, *Grutter* illustrates, has in the Supreme Court an invaluable ally that accords it extreme deference.

The arguments against race preferences in higher education are by now so familiar as not to require lengthy recitation. They include that their effect is to increase race consciousness and divisiveness. They virtually demand the formation of racially based groups in every organization and institution to fight for racial advantage and resist racial disadvantage. It does blacks a dubious favor to place them in schools for which they do not meet the ordinary qualifications, in effect guaranteeing that they play in a league in which they are not fully competitive. It also does them a dubious favor to accept as official national policy the proposition that they cannot and, therefore, should not be expected to compete with whites and Asians on equal terms in academic pursuits. Preference for blacks carries a message to them, John McWhorter has argued, that reliance on race can be a substitute for reliance on effort.¹³⁴ If blacks may be exempt from college and university admission standards applicable to others, why should they not, the question arises, also be exempt from other onerous requirements applicable to others? Acceptance of a general black exemption from requirements applicable to others means, however, the end of hope for a multiracial integrated society, because the only possible response of those who must comply with established standards to those who need not is to seek separation.

Race preferences cannot be expected, as Justice O’Connor fatuously assumed, to come to an end. Experience shows, as Thomas Sowell, our most perceptive and knowledgeable student of the subject, has reported in detail, that they only expand and become more deeply entrenched.¹³⁵ As Sowell’s study of its results across the world shows, “the destructive effects of a policy of race preferences in every society that adopts it is not a matter of speculation or prediction.”¹³⁶ It is unlikely that history will look kindly on Justices Powell and O’Connor for finding dishonest means of upholding that policy.

134. JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 223 (2000).

135. THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* 2 (2004).

136. *Id.* at 196–97.